IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. v. ROBB E. YORK, Appellant.	No. 38590-2-II UNPUBLISHED OPINION

Penoyar, J. — Robb E. York appeals his convictions of second degree assault (domestic violence),[1] second degree taking a motor vehicle without owner's permission (domestic violence),[2] unlawful imprisonment (domestic violence),[3] and interference with reporting of domestic violence.[4] He claims on appeal that trial counsel's failure to object to the admission of propensity evidence denied him his constitutional right to effective representation.

We address only this contention because we find it dispositive. Trial counsel failed to offer a proper objection or limiting instruction on State's exhibit 33, which was, in part, a properly admissible victim's statement, but it also contained highly prejudicial character evidence and thereby denied York his right to effective representation. Thus, we reverse and remand.

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[1] A violation of RCW 9A.36.021(1)(a) and RCW 10.99.020.

[2] A violation of RCW 9A.56.075 and RCW 10.99.020.

[3] A violation of RCW 9A.40.040 and RCW 10.99.020.

[4] A violation of RCW 9A.36.150.

Facts

Clark County Sheriff's Deputies Robin Ternus and Jared Stevens interviewed NLM following a 9-1-1 call. Their report described NLM as crying excessively, shoeless, having a swollen cut lower lip and a swollen shut left eye. She explained that she had been with York earlier that evening at the Island Café when they got into an argument over a girl there that York apparently knew. The argument escalated and Robb called her an "f****** whore." 4 Report of Proceedings (RP) at 59. At that point they got in the car and she was driving home and he started punching her in the head. Near her apartment, she pulled the car over, got out, and started walking. RP 61. York then pulled the car up alongside her and told her to get in the car. When she refused, he grabbed her, knocked her down, and dragged her to the car.

At that point, she gave in, got in the car, and he drove to Oscar's, a nearby mini-mart. There, they continued to argue and he began hitting her again. She then got out of the car to use a payphone to call 9-1-1. Before she could do so, however, "he knocked the phone out of her hand, punched her in the head, knocked her to the ground, and then got into the -- the Grand Am that she was driving and drove off with it without her permission." 4 RP at 62. She ran back to her apartment complex.

The State charged York with the four charges noted above and the matter was tried to a jury. In addition to the evidence noted above, Dr. Shawn Van Deusen, the emergency room doctor that treated NLM, testified that NLM had a black eye that was swollen shut, hematoma on her head and scalp, and multiple bruises on her upper and lower extremities (too many to count). She complained of chest wall and neck pain and was nauseous and in moderate to severe pain. NLM told Dr. Van Deusen that her boyfriend had assaulted her after she told him she did not

want to be with him anymore.

NLM testified at trial that she had known York for 18 years and had been in love with him for the past 8 years. She explained that when they were at the Island Café on August 30, she told York that she wanted to be with someone else not York. York responded, "[I] know[ ] the guy . . . [He] thinks [you're] a whore . . . [and] won't be with you." 4 RP at 98. She said this remark angered her and when he told her that the bartender was beautiful but "[y]ou're ugly" she got very angry and decided to get him angry with her. 4 RP at 99.

She said they left the café but started arguing after she struck a curb and knocked her tire off the rim. They continued to argue while York fixed the tire and at one point after they were back on the road and stopped at a traffic light, she said she started hitting him and that she was "wailing on him" and he eventually hit back. 4 RP at 104.

During her testimony, she confessed to not remembering a lot of the details and the prosecutor had her read part of the statement she gave to Detective Ternus:

> On August 29, 2008, on the way home from Jantzen Beach, Robb and I became involved in an argument or I became involved in an argument with Robb York. The fight got out of control and I tried to get out of the car.
>
> He wanted to talk and work things out. That's when I told him that I wanted to be with someone else and he started hitting me and I hit him back.
>
> I jumped out of my car and took the keys, but he was really angry and said give him the keys or else. I did because I wanted it to stop.
>
> He left in my car without permission and when I got out of the car at Oscar's Market, I called 9-1-1. He hit the phone out of my hand and I knocked – and knocked me to the ground. The call was not completed.
>
> When he was picked up he was carrying my ID.

4 RP at 106-07 (quoting Ex. 33).

She blamed herself for the situation: "It's my fault because I aggressed the situation. I didn't let it diffuse. I didn't do the right thing." 4 RP at 110. She said that he just wanted to take

her home. She also testified that York always had permission to drive her car.

The trial court gave the jury a self-defense instruction on the lawful use of force as to the second degree assault charge. The jury returned guilty verdicts on all counts. The trial court imposed concurrent sentences; the longest being 27 months' incarceration. It also imposed a 10-year no contact order, prohibiting York from having any contact with NLM.

analysis

I. Propensity Evidence

York claims that counsel's failure to properly object to the admission of NLM's affidavit denied him effective assistance because the affidavit contained inadmissible propensity evidence. The first page of NLM's statement detailed the events of the evening and, as we noted above, the prosecutor had her read it to the jury. The second page of NLM's affidavit contained a series of questions and checkboxes regarding prior domestic violence.

To the question, "Has this person done this type of thing to you before?," NLM circled, "Yes," followed with "Nov 2005?" Ex. 33. She indicated that she had made a police report at that time. The form then asked, "Are Any of the Following Currently Occurring or Have Occurred? Ex. 33. NLM checked the boxes for the following:

- Contemplated, threatened or attempted suicide
- Controlled or restricted your freedom
- Said "If I can't have you, no one will"
- Accused you of cheating
- Tried to control your daily activities
- Stalked, repeatedly harassed/followed causing fear
- Choked (strangled) you or other family members
- Abuses alcohol or drugs
- Violent toward children
- Been violent outside your relationship
- You have told suspect you're leaving

- You are in the process of leaving suspect

Ex. 33. The form then asked if any of these things occurred in the last twelve months. NLM responded, "Stalked looking in windows ect. [sic] daily? Ex. 33.

York argues that the admission of this exhibit was unfairly prejudicial, making it highly unlikely that the jury would acquit him.

The State responds that neither it nor defense counsel discussed the affidavit in argument, only the first page came in through NLM's testimony, and, furthermore, had he objected, the court would have denied his objection based on *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). There, at least four justices of our Supreme Court held that evidence of past domestic violence and fighting was admissible to assist the jury in judging the recanting victim's credibility and state of mind. 164 Wn.2d at 186.

ER 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To justify the admission of prior acts under ER 404(b), there must be a showing that the evidence serves a legitimate purpose and is relevant to prove an element of the crime charged, as well as a showing that its probative value outweighs its prejudicial effect. *Magers,* 164 Wn.2d at 184. We generally review a decision to admit evidence under ER 404(b) for an abuse of that discretion. *State v. Grant,* 83 Wn. App. 98, 105, 920 P.2d 609 (1996).

Here, though, because defense counsel did not object, the trial court did not exercise its discretion and so our review is limited to deciding whether trial counsel's failure to object was

unreasonable and unfairly prejudicial. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We begin with the presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). This presumption continues until the defendant shows in the record the absence of legitimate or tactical reasons supporting his counsel's conduct. *State v. McFarland*, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995).

In *Magers*, our Supreme Court discussed the admissibility of prior domestic violence for purposes of showing the victim's intent and for the jury to assess the victim's credibility and understand why she told conflicting stories. The court agreed with Division One's decision in *Grant*, 83 Wn. App. 98, "at least insofar as evidence of prior domestic violence is concerned." *Magers,* 164 Wn.2d at 185. It disagreed with this court's decision in *State v. Cook,* 131 Wn. App. 845, 851, 129 P.3d 834 (2006), that such evidence is only admissible to show state of mind. The court noted that such evidence may be admissible under ER 404(b) on less traditional theories tied to the characteristics of domestic violence itself. *Magers,* 164 Wn.2d at 186 (quoting 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Evidence ch. 5, at 234 (2007-08)). The court cited with approval Tegland's discussion of *Grant:*

> [T]he defendant was charged with assaulting his wife[.] [T]he defendant's prior assaults against his wife were admissible on the theory that the evidence was "relevant and necessary to assess Ms. Grant's [the victim's] credibility as a witness and accordingly to prove that the charged assault actually occurred." . . . "The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim."

5D Tegland, Washington Practice: Courtroom Handbook on Evidence, at 234 (quoting *Grant,* 83 Wn. App. at 106, 108) (cited in *Magers,* 164 Wn.2d at 186). The *Magers* court concluded

that prior acts of domestic violence, involving the defendant and the crime victim, are admissible to assist the jury in judging the credibility of a recanting victim. *Magers,* 164 Wn.2d at 186.[5]

Certainly much of page two of NLM's domestic violence victim statement was evidence of prior domestic violence and thus potentially admissible under *Magers*. This fact alone should not have signaled York's counsel that it was acceptable to simply let the jury have all of page two. First, some of the items on page two's checklist are at least potentially not evidence of prior domestic violence between York and NLM. Also, some of the checked items may not have involved NLM or York or may not have related to any domestic violence, such as suicide attempts or mental health problems. Counsel should have objected to the admission of these entries or at least made further foundational inquiry, with the jury excluded. Next, counsel should have asked the trial court to weigh the probative value of the entries against their prejudice. ER 404(b); *Magers,* 164 Wn.2d at 184. Finally, York's counsel should have requested a limiting instruction to limit the jury's consideration of page two to NLM's credibility. *Magers*, 164 Wn.2d at 186; *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007) (trial court must give limiting instruction when admitting prior bad acts evidence to prevent unfair prejudice) (citing *State v. Lough*, 125 Wn.2d 859, 864, 889 P.2d 487 (1995)).

This exhibit, which the State urged the jury to examine in light of NLM's trial testimony, contained information about York that the jury could not ignore, painting a picture of him as a frightful, violent, psychologically unstable man, a stalker, and a person who would hit both

[5] Only four justices signed the majority opinion with two justices concurring but writing separately that evidence that the defendant had previously been in trouble for fighting was not admissible to show the victim's state of mind or for assessing the victim's credibility. The justices, though, found the error harmless and agreed that prior acts of domestic violence between the defendant and the victim were admissible.

women and children. Any doubts that the jury may have had about NLM being the aggressor or York defending himself against her attacks could not have withstood the harsh reality this exhibit portrayed. Under the instructions given, the jury was free to use York's prior bad acts to conclude that he acted similarly here. While York's defense may not have swayed the jury absent this evidence, its admission denied him his right to a fair trial and an impartial jury. Counsel's failure to object in any way or offer a limiting instruction was unreasonable and unfairly prejudiced his client. No legitimate tactical reason for this course of action exists. None of York's convictions is unaffected as each turn on credibility. We reverse and remand.

II. Other Issues

York also challenged trial counsel's failure to request a fourth degree assault instruction and the sentencing court's imposition of a 10-year no contact order on all offenses, including the two class C felonies and the misdemeanor conviction. We need not address these issues, as they will not necessarily arise if York is retried.

We reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Houghton, J.